

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ROBERT E. WRIGHT, SR. : CIVIL ACTION  
 :  
 v. :  
 :  
 MONTGOMERY COUNTY, et al. : NO. 96-4597

**MEMORANDUM AND ORDER**

HUTTON, J.

May 5, 1999

Presently before the Court are the Motion for Sanctions Seeking Dismissal of Plaintiff's Complaint for Plaintiff's Violations of this Court's Orders, Discovery Obstructions, and Violation of the Federal Rules of Civil Procedure by Defendants<sup>1</sup> (Docket No. 101), Defendants' Supplemental Omnibus Motion for Sanctions (Docket No. 103), and the Plaintiff Robert E. Wright, Sr.'s response thereto (Docket No. 112). For the foregoing reasons, Defendants' Motion is **DENIED**.

**I. BACKGROUND**

This is an employment discrimination case based on race. In his sole remaining count, Robert E. Wright, Sr. ("Wright" or Plaintiff") claims that Defendants retaliated against him by terminating his employment as Director at the Montgomery County Department of Housing Services ("MDHS") for protesting against his

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<sup>1</sup>Montgomery County and Montgomery County Commissioners, Mario Mele, Richard S. Buckman, and Joseph M. Hoeffel, III, are collectively referred to as "Defendants."

own mistreatment for being a member of a racial minority. In the instant motion, Defendants move this Court to dismiss this claim pursuant to Rule 37 of the Federal Rules of Civil Procedure. Defendants filed their motion on February 19, 1999. They filed a supplement to that motion on February 26, 1999. On March 5, 1999, the Plaintiff filed his response in opposition to the Defendants' motion. On April 29, 1999, the Court conducted a hearing on this issue.

## **II. DISCUSSION**

### **A. Standard**

Rule 37(d) empowers the Court to impose sanctions upon parties who fail to attend a properly noticed deposition, to serve answers to interrogatories, or to respond to requests for production of documents. Fed. R. Civ. P. 37(d). The Court may, inter alia, dismiss the action or render a default against the disobedient party. Fed. R. Civ. P. 37(d); Fed. R. Civ. P. 37(b)(2)(C). Similarly, under Rule 41(b), the Court is empowered to dismiss a claim where the plaintiff has failed "to prosecute or to comply with [the Federal Rules of Civil Procedure] or any order of Court...." Fed. R. Civ. P. 41(b). Whether to dismiss a case for failure to prosecute or abide by court orders is a matter of discretion for the trial court. Curtis T. Bedwell & Sons, Inc. v. International Fidelity Ins. Co., 843 F.2d 683, 691 (3d Cir. 1988)

(citing National Hockey League v. Metropolitan Hockey Club, Inc., 427 U.S. 639, 643 (1976) (per curiam)).

In exercising its discretion under Rule 37(d), the Court must employ the balancing test set forth in Poulis v. State Farm Fire & Casualty Co., 747 F.2d 863, 867-68 (3d Cir. 1984). Specifically, the Court must weight the following six factors: (1) the extent of the party's personal responsibility; (2) prejudice to the adversary; (3) whether there has been a history of dilatoriness in the case; (4) whether the conduct of the party or the attorney was willful or in bad faith; (5) the effectiveness of alternative sanctions; and (6) the meritoriousness of the claim or defense. Id. The Poulis balancing test also applies to a motion for dismissal under Rule 41(b). Dunbar v. Triangle Lumber & Supply Co., 816 F.2d 126 (3d Cir. 1987). The Court will consider each factor in turn.

## **B. Analysis**

### **1. Plaintiff's Personal Responsibility**

In their motion, the Defendants contend that Wright has obstructed discovery by failing to produce discoverable evidence. (Defs.' Mem. 15.) At the hearing before this Court, the Defendants conceded that the Plaintiff has since responded to those requests. (Hearing Transcript ("H.T.") 8, 17, 31-32). The Defendants claim, however, that the Plaintiff has still failed to produce "all information" that was requested. (Id.) The Plaintiff contends

that he has produced all documents within his possession. (H.T. 31-32.) He claims that documents not produced were destroyed in a fire that occurred in his house in May of 1997. (H.T. 33.) Moreover, the record does not establish Plaintiff Wright's personal responsibility for the prior failure to comply with the discovery requests. The record is void of evidence of Wright's personal participation in a strategy to delay and hinder discovery in this case. Cf. Curtis T. Bedwell and Sons, Inc. v. Int'l Fidelity Ins. Co., 843 F.2d 683, 692-93 (3d Cir. 1988) (plaintiff sharing responsibility with counsel "for the repeated discovery abuses and violations of court orders" when record showed his personal involvement in a deliberate strategy to hinder discovery).

All other discovery sought by the Defendants concern non-parties to this action. For example, the Defendants seek documents from non-parties Commerce Abstract, Joseph Pizonka, Northtowne II, Sheilah Wright, amongst others. The Plaintiff represented that it has no control over these non-parties. (H.T. 11.) Nonetheless, the Defendants contend that the Plaintiff should be held responsible for the non-parties' alleged discovery abuses. The Defendants fail to cite, however, any authority for this contention. The Defendants merely note the relationship the Plaintiff has to these non-parties. The first Poulis factor, therefore, does not favor dismissing Plaintiff's action.

## **2. Prejudice to Plaintiffs**

In their motion, the Defendants assert that dismissal of the Plaintiff's complaint is warranted because they have been severely prejudiced by the Plaintiff's failure to provide discovery. The prejudice of which the Defendants allege, however, has been quashed by the Plaintiff's recent answer to the Defendants' discovery requests.

As this Court has noted above, the Plaintiff has complied with the Defendants' discovery requests. Moreover, the fact that the Defendants filed the Motion for Sanctions seeking to dismiss the Plaintiff's complaint on February 19, 1999, more than five months after they had filed their first motion for summary judgment on September 28, 1998,<sup>2</sup> suggests that no prejudice ever existed. All of the discovery disputes in this case pertain to evidence of the Plaintiff's alleged misconduct while he held the position of Director at the Montgomery County Department of Housing Services ("MDHS").<sup>3</sup>

The Court finds that the Defendants had sufficient evidence of the Plaintiff's misconduct when they filed their first motion for summary judgment as summarized below:<sup>4</sup>

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<sup>2</sup>The Defendants also filed motions for summary judgment on January 28, 1999, and February 16, 1999, concerning the Plaintiff's sole remaining Count I of his complaint.

<sup>3</sup>The Defendants have repeatedly asserted that the Plaintiff's misconduct gave them a rational basis to terminate the Plaintiff.

<sup>4</sup>The Court notes that although the Defendants produced sufficient evidence of the Plaintiff's misconduct with their motion for summary judgment, the Court found that a genuine issue of material fact existed as to whether the Plaintiff's termination was racially motivated. The Court found that

(1) The Defendants produced the May 20, 1996 HUD OIG Audit Report ("HUD Report"), which found that the Plaintiff engaged in conflicts of interests, mismanagement, and other misconduct while Director of the MDHS. In their motion for summary judgment, the Defendants asserted that "any one reason contained within the HUD Report and its findings are a rational basis for their termination." The Court agrees and finds that the HUD Report constituted sufficient evidence of the Plaintiff's misconduct.

(2) The Defendants produced the October 2, 1998 deposition of the Plaintiff, admitting that several HUD contractors performed work on properties privately owned by the Plaintiff and his partner, Joseph Pizonka, in violation of County, State and Federal regulations and procedures. Thus, the Court finds that the Plaintiff's October 2, 1998 deposition constituted sufficient evidence of the Plaintiff's misconduct.

(3) The Defendants produced the Grievance Hearing Transcript for Robert Wright from July 2, 1996 and July 3, 1996, where the Plaintiff admitted that several HUD contractors performed work on properties privately owned by the Plaintiff and his partner, Joseph Pizonka, in violation of County, State and Federal regulations and procedures. Thus, the Court finds that the July 2, 1996, and July 3, 1996 Grievance Hearing Transcript for Robert Wright constituted sufficient evidence of the Plaintiff's misconduct.

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Wright had produced sufficient evidence for a reasonable jury to infer that race was a determinative factor in Plaintiff's termination. The disputed causal connection and the credibility of the proffered explanation are, of course, issues that a jury must resolve.

(4) The Defendants produced copies of bills for Northtowne Realty Properties, which was partially owned by the Plaintiff, for work that Mark Reichelt, a HUD contractor, had performed on properties owned by the Plaintiff. The Defendants also produced evidence of payments to Mark Reichelt from Northtowne Realty. Thus, the Court finds that the evidence of work performed on properties owned by Northtowne Properties by HUD contractor, Mark Reichelt, constituted sufficient evidence of the Plaintiff's misconduct.

Accordingly, the Court finds that when the Defendant's filed their first motion for summary judgment on September 28, 1998, they had sufficient evidence of the Plaintiff's misconduct while he was Director at the MDHS. The Defendants had no prejudice by the Plaintiff's lack of cooperation during discovery. This factor, therefore, strongly supports not dismissing this action.

### **3. A History of Dilatoriness**

In this particular discovery dispute the record plainly evidences a history of dilatoriness on Wright's behalf with respect to the requests at issue. Defendants have advised the Court on several occasions concerning Wright's failure to produce the requested materials. This Court has noted:

[t]he record evidences a history of dilatoriness on the part of the Plaintiff. See Wright, 1998 WL 848107, at \*6 (noting the "apparent lack of cooperation by the Plaintiff"). Despite repeated efforts by the Defendants, Wright has ignored Defendants' requests for production.





Wright, 1999 WL 80275, at \*3. One Poulis factor, however, is not controlling. See C.T. Bedwell & Sons, 843 F.2d at 696.

#### **4. Willfulness or Bad Faith**

Culpable conduct is dilatory behavior that is willful or in bad faith. Gross, 700 F.2d at 123-24; Feliciano, 691 F.2d at 657. In this context, conduct is considered culpable, "if it is 'willful' or 'in bad faith' ... [Citation omitted.] ... or if it is part of a deliberate trial strategy." Skaggs, supra, 130 F.R.D. at 529. Although the Court has found that a history of dilatoriness is supported by the record, the record does not support the contention that the Plaintiff has engaged in a "deliberate trial strategy" of obstructing discovery. Accordingly, this factor does not support dismissing this case.

#### **5. Alternative Sanctions**

As this Court has already noted, the Plaintiff has provided full and complete responses to the Defendants' discovery requests. The record does not establish willfulness or bad faith on the part of the Plaintiff. Moreover, the Defendants have not been prejudiced in this case. Dismissal of this action is, therefore, not an appropriate sanction.

#### **6. Meritoriousness of the Claim**

A plaintiff's claim is "deemed meritorious when the allegations of the pleadings, if established at trial, would

support recovery by plaintiff." Poulis, 747 F.2d at 870. In a Pretrial Order, see Mem. and Order dated Mar. 15, 1999, the Court denied a motion for summary judgment to dismiss Plaintiff's retaliation claim. The court denied the motion because Plaintiff established all three elements of a prima facie case of retaliation. Inherent in this finding is that, if established at trial, the allegations would support recovery by Plaintiff. Thus, the Court finds that the meritoriousness factor here supports not dismissing the action.

### **III. CONCLUSION**

Five of the six Poulis factors do not support dismissal here. Thus, even though the third factor supports dismissal, the balance of factors strongly supports not dismissing the instant action.

An appropriate Order follows.

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O R D E R

AND NOW, this 5th day of May, 1999, upon consideration of Motion for Sanctions Seeking Dismissal of Plaintiff's Complaint for Plaintiff's Violations of this Court's Orders, Discovery Obstructions, and Violation of the Federal Rules of Civil Procedure by Defendants<sup>5</sup> (Docket No. 101), Defendants' Supplemental Omnibus Motion for Sanctions (Docket No. 103), and the Plaintiff Robert E. Wright, Sr.'s response thereto (Docket No. 112), IT IS HEREBY ORDERED THAT Defendants' Motion is **DENIED**.

BY THE COURT:

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HERBERT J. HUTTON, J.

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<sup>5</sup>Montgomery County and Montgomery County Commissioners, Mario Mele, Richard S. Buckman, and Joseph M. Hoeffel, III, are collectively referred to as "Defendants."